Supreme Court U.S.
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No. _____

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IN THE

# Supreme Court of the United States

OCTOBER TERM 2000

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PATRICIA TOTH AND BONITA UJDAK,
*Petitioners,*

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
*Respondent.*

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**Petition for Writ of Certiorari to the Court of Appeals of Indiana**

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DONALD E. WERTHEIMER
1017 E. Jefferson Blvd.
South Bend, Indiana 46617
(219) 288-6866
*Counsel of Record*

January 22, 2000

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## QUESTIONS PRESENTED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits any State from depriving any person of life, liberty, or property without due process of law. Property rights which fall within the protection of the Due Process Clause include interests which are created and defined by rules or mutually explicit understandings that support a claim of entitlement to the benefit and which may be invoked at a hearing. In addition, Article I, Section 10 of the United States Constitution prohibits any State from passing any law impairing the obligation of contracts.

The question presented for review is whether the Court of Appeals of Indiana erred as a matter of law in holding that Petitioners Toth and Ujdak, as teachers and public employees of Respondent South Bend Community School Corporation, had no protected property interest or contractual right in the seniority rights which they acquired during previous years of teaching, pursuant to statutes, contracts, and mutually explicit understandings in effect at the time.

## LIST OF PARTIES

The parties to the proceeding in the St. Joseph County, Indiana, Circuit Court and the Indiana Court of Appeals below include petitioners Patricia Toth and Bonita Ujdak, plaintiffs and appellees below, and respondent South Bend Community School Corporation, defendant and appellant below.

Additional parties to the proceedings below include the following: Julie Andrews, John W. Berta, Rosemarie Bradford, Anita Golba, Barbara Gottlick, Helen Keller, Cleora Kelsch, Sandra J. Koch Bolka, Janet L. Kochanowski, Kenneth Marosz, Margaret McAllister, Linda Newcomer, Mary Pajakowski, John Panos, Sue Paulin, Gordon Polsgrove, Kathleen Renz, Dora L. Riddle, Perry B. Scott, Lynne D. Sill, Dale L. Strombeck, Judith E. Taelman, Joan Tetzlaff, Kathy Troester, John P. Wibbens, Alan S. Bell, Wallace Boocher, Kathryn A. Britton, Larry L. Edler, J.A. Garretson, Sue Hill, Bonita Hoover, Edward J. Linetty, Jean Meiss, Richard B. Rajter, Richard Thomaszewski, Terry Tulchinsky, and Elmer Britton, plaintiffs and appellees below; and Hollis E. Hughes, Jr., William L. Wilson, Loretta Jacobson, Oscar T. Brookins, Anthony V. Luber, Eileen T. Bender, and Donald W. Yates, acting in their official capacities as members of the South Bend Community School Corporation Board of Trustees, defendants and appellants below.

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## PETITION FOR WRIT OF CERTIORARI

Patricia Toth and Bonita Ujdak respectfully petition that a writ of certiorari issue to review the decision of the Court of Appeals of Indiana in the above-captioned proceeding.

## OPINIONS BELOW

The Order of the St. Joseph County, Indiana, Circuit Court granting petitioners Toth's and Ujdak's Motion for Summary Judgment was issued on August 9, 1999 and is unreported. It is reprinted in Appendix A hereto.

The Memorandum Decision of the Court of Appeals of Indiana reversing the judgment of the St. Joseph County Circuit Court was issued on June 5, 2000 and is unreported. It is reprinted in Appendix B hereto.

The ruling of the Indiana Supreme Court denying transfer of the cause below was issued on October 25, 2000 and is unreported. It is reprinted in Appendix C hereto.

The Order of the St. Joseph County, Indiana, Circuit Court upon remand from the Court of Appeals of Indiana was issued on July 6, 2000 and is unreported. It is reprinted in Appendix D hereto.

## BASIS FOR JURISDICTION

The Opinion of the Court of Appeals of Indiana sought to be reviewed was entered on June 5, 2000. A Petition for Rehearing was denied by the Court of Appeals of Indiana on July 19, 2000. A Petition for Transfer to the Indiana Supreme Court was denied on October 25, 2000. Jurisdiction to review the judgment of the Court of Appeals of Indiana upon writ of certiorari is conferred on this Court by Title 28, section 1257 of the United States Code.

## CONSTITUTIONAL PROVISIONS AT ISSUE

The constitutional provisions at issue include the following:

> No State shall . . . pass any . . . law impairing the obligation of contracts[.]

U.S. Const., Art. I, § 10, ¶ 1.

The constitutional provisions at issue further include the following:

> No State shall . . . deprive any person of life, liberty, or property without due process of law.

U.S. Const., Amend. XIV, ¶ 1.

## STATUTORY PROVISIONS AT ISSUE

Respondent South Bend Community School Corporation has raised certain provisions of the Indiana Teacher Tenure Act, Ind. Code § 20-6.1-4-14.5, which it contends are relevant, as follows:

> (a) The provisions of this chapter may not be construed to limit the provisions of a collective bargaining agreement negotiated under IC 20-7.5.
>
> (b) Notwithstanding this chapter, this chapter does not prohibit a school employer and an exclusive representative from collectively bargaining contracts that alter the requirements of sections 10, 10.5, 11, 12, and 14 of this chapter and IC 20-6.1-5-15.

Petitioners Toth and Ujdak contend that the following provision of the Indiana Certificated Educational Employee Bargaining Statute, I.C. § 20-7.5-1-1 et seq., referred to in the foregoing statute, is also applicable; specifically I.C. § 20-7.5-1-3, which provides:

> No contract may include provisions in conflict with (a) any right or benefit established under state or federal law[.]

## STATEMENT OF THE CASE

### A. Background

This cause was initiated in the St. Joseph County, Indiana Circuit Court on October 5, 1982 as an Action for Mandate and Motion for Preliminary Injunction brought by Petitioners Patricia A. Toth, Bonita Ujdak, and others as plaintiffs below, sub nom. Andrews v. South Bend Community School Corp., Cause No. P-1077. The plaintiffs below were teachers employed by Respondent South Bend Community School Corporation [hereinafter the SBCSC] who were laid off in Spring of 1992. The plaintiffs sought to enjoin the SBCSC and its Board of Trustees, defendants below, from applying or enforcing Article XXIII, Section 9 of the 1980-83 Collective Bargaining Agreement (CBA) between the SBCSC and the National Education Association-South Bend (the "no-minority-layoff" clause).[1] The suit was brought in response to layoffs which occurred in Spring of

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[1] The "no-minority-layoff" clause provided as follows: "No minority bargaining unit employee shall be laid off."

1982 in which the SBCSC laid off 146 teachers, all of whom were white, and 48 of whom had greater seniority than minority teachers who were retained pursuant to the "no-minority-layoff" clause.

The cause was removed to the District Court for the Northern District of Indiana and consolidated with another cause sub nom. Britton v. South Bend Community School Corp., 593 F. Supp 1223 (N.D. Ind. 1984). The District Court, after bench trial, ruled in favor of the SBCSC. The judgment of the district court was affirmed by a divided panel of the Seventh Circuit Court of Appeals sub nom. Britton v. South Bend Community School Corp., 775 F.2d 794 (7th Cir. 1985). The full court then granted a hearing en banc, and reversed the judgment of the district court sub nom. Britton v. South Bend Community School Corp., 819 F.2d 766 (7th Cir. 1987). The Britton court determined that the layoff plan conducted pursuant to the "no-minority-layoff" provision was an unconstitutional deprivation of equal protection, and remanded the cause for further proceedings. Id., 819 F.2d at 772.

B. Proceedings in the St. Joseph Circuit Court

The cause was remanded from the federal courts to the St. Joseph Circuit Court on December 21, 1989. Upon remand, remaining plaintiffs in the case were classified as either Group I teachers (those whose seniority would have protected them from the 1982 layoffs if not for the illegal "no-minority-layoff" clause), or Group II teachers (those who would have been laid off anyway regardless of the "no-minority-layoff" clause). A compensation formula for Group I teachers was agreed to by the parties.

Prior to the effective date of the 1980-83 CBA between the SBCSC and the National Education Association-

South Bend, there was a seniority system in effect in the SBCSC. Said seniority system determined a teacher's seniority based upon the number of years a teacher taught in the system, regardless of any interruption or break in service.[2] This seniority system was not a part of or governed by any collective bargaining agreement. The 1980-83 CBA introduced a seniority system in which seniority was defined as "the teacher's length of continuous service from his/her beginning date of last employment in the South Bend Community School Corporation."

Petitioner Ujdak was first employed by the SBCSC as a full-time teacher for the 1964-65 and 1965-66 school years. Prior to her layoff in Spring 1982, Ujdak taught as a full-time teacher in the SBCSC for the 1978-79, 1979-80, 1980-81, and 1981-82 school years. Ujdak was required to resign after the 1965-66 school year due to pregnancy. It was school board policy at the time that a pregnant teacher was required to resign in the fifth month of pregnancy. When Ujdak returned to the SBCSC in 1978, she was informed by the administration that she would be given credit for the two years she had taught in the 1960s.

Petitioner Toth was first employed by the SBCSC as a full-time teacher for the 1969-70, 1970-71, and 1971-72 school years. Prior to her layoff in Spring 1982, Toth taught as a full-time teacher in the SBCSC for the 1979-80, 1980-81, and 1981-82 school years. Toth was also required by school board policy to resign after the 1971-72 school year due to pregnancy. When Toth returned to the SBCSC in 1979, she was promised that she would be credited with her

---

[2] Prior to the 1980-83 CBA, the term "seniority" was not expressly used within SBCSC. However, prior to 1980, a tenured teacher would be credited with all years taught in SBCSC.

three years of prior teaching experience. Toth relied on the representation in giving up a tenured teaching post and returning to the SBCSC.

In the teacher layoffs from the SBCSC which became effective June 1, 1982, the most senior laid-off teacher having elementary certification had a seniority of "4/6". The number to the left of the slash (/) represents number of years of service with the SBCSC, while the number to the right represents years of experience with other school systems or with the SBCSC prior to receiving tenure. On August 17, 1990, following discovery, Petitioners Toth and Ujdak and other plaintiffs below filed a Motion for Partial Summary Judgment concerning the illegality of their layoffs. On August 28, 1991, plaintiffs and the SBCSC entered into a Stipulation of Facts concerning seniority rights acquired by teachers prior to the 1980-83 CBA. Ujdak contended that her seniority at the time of layoff was 5/0, while the SBCSC contended that it was 3/2. Toth contended that her seniority at the time of layoff was 5/7.5, while the SBCSC contended that it was 2/10.5.

On April 8, 1992, plaintiffs below filed a Statement of Plaintiffs Concerning Type of Action and Contentions. Concerning plaintiffs Toth and Ujdak, the April 8, 1992 statement sharpened the contentions of Toth and Ujdak that they had been wrongfully deprived of constitutionally protected, vested rights in their acquired seniority which, if not so deprived, would have placed them among Group I teachers rather than Group II teachers; and that they were therefore entitled to the relief awarded to Group I teachers as a result of the 1982 layoffs. The portion of the Record in which Toth's and Ujdak's federal claims were timely and properly raised in the Circuit Court is reproduced in Appendix E.

On July 29, 1992, the trial court entered a Formal Order for Ruling of 7-10-92. The trial court dismissed the

claims of Group II teachers on grounds that they had suffered no damage, but continued the claims of any Group II plaintiffs alleging special damages from the layoff under Art. XXIII, section 9 of the 1980-83 CBA. The trial court continued the complaints of Toth and Ujdak based upon their contentions. On December 21, 1993, pre-trial hearing was held and plaintiffs were ordered to delineate and plead each measure of special damages permitted under the court's July 29, 1992 Order.

On June 1, 1994, plaintiffs below filed Plaintiffs' Statement of Claims on behalf of plaintiffs Toth, Ujdak, and six (6) additional Group II plaintiffs alleging special damages. Concerning Toth and Ujdak, the statement set forth their claims for damages based upon the damages formula used for settlement of the claims of the Group I teachers. Concerning the six (6) remaining plaintiffs alleging special damages (Wallace Boocher, Ann Deitl, Sue Hill, Carla Killelea, Richard Rajter, and Christine Wrobel), these special damages are pending in the Circuit Court below but are not part of the decision being appealed.

On September 14, 1994, the SBCSC filed Defendant's Response to Plaintiffs' Statement of Claims.

On November 12, 1996, Toth and Ujdak filed Motions for Summary Judgment and supporting exhibits. On May 9, 1997, the SBCSC filed Responses and Cross-motions for Summary Judgment against Toth and Ujdak.

On August 9, 1999, the Circuit Court entered judgment in favor of Toth and Ujdak, finding that they had a vested right in the seniority rights held prior to the 1980-83 CBA, making them tenured teachers at the time they were laid off, and that they should be compensated pursuant to the formula that had been determined for Group I teachers. (App. A at 1a).

C. Proceedings in the Court of Appeals of Indiana

On September 8, 1999, the SBCSC filed praecipe for record of the proceedings to initiate an appeal to the Court of Appeals of Indiana. On June 5, 2000, the Court of Appeals of Indiana rendered a memorandum decision reversing the judgment of the Circuit Court on the issue of their claim to a vested property interest. The Court of Appeals held that Toth and Ujdak did not have the legally protected property interest they claimed, on grounds that the Indiana Teacher's Tenure Act, Ind. Code § 20-6.1-1-14.5, explicitly permitted changes to seniority provisions, and no vested seniority rights existed under the Act. (App. B at 7b). The Court of Appeals further held that seniority obligations imposed by a collective bargaining agreement expire upon termination of the agreement. (App. B at 8b). The Court of Appeals further held that there were no rules or mutually explicit understandings that supported Toth's and Ujdak's claim of entitlement to their seniority rights. (App. B at 8b). Upon remand from the Court of Appeals, the Circuit Court on July 6, 2000, denied Toth's and Ujdak's Motions for Summary Judgment and granted the SBCSC's Motion for Summary Judgment. (App. D at 3d).

The Court of Appeals denied Toth's and Ujdak's Petition for Rehearing on July 19, 2000. The Indiana Supreme Court denied Toth's and Ujdak's Petition for Transfer on October 25, 2000. (App. C).

## REASONS FOR GRANTING THE WRIT

The law is well settled that the protections of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the provision of Article I, section 10 of the United States Constitution which prohibits any State

from passing any law which impairs the obligation of contracts, protect the vested property interests and contract rights of public employees acquired pursuant to their contracts of employment with a State or an arm thereof. The question at issue in this case is whether these protections extend to the rights in seniority which Toth and Ujdak accumulated during their years of teaching at the SBCSC prior to the implementation of the 1980-83 CBA.

While the question of whether seniority rights are vested property rights has been addressed in the context of private sector labor litigation, there is little or no precedent in caselaw in which this question has been addressed in the context of employees of a governmental unit whose actions are subject to constitutional limitation. The United States Constitution clearly limits the power of the SBCSC as an arm of the State of Indiana to arbitrarily deprive any employee of property rights which that employee acquired pursuant to contract, statute, or mutually explicit understandings that support claims of entitlement to the benefits, and further prohibits the SBCSC from impairing any contractual obligation in favor of such employees in the absence of an overriding public purpose. The seniority rights acquired by Toth and Ujdak during their prior years of teaching are just such vested property and contract rights. The Court of Appeals of Indiana was therefore in error in holding that Toth and Ujdak had no protectable interests, and its reversal of the judgment of the St. Joseph Circuit Court was unlawful and unconstitutional.

A. Toth's and Ujdak's seniority rights were acquired pursuant to rules and mutually explicit understandings which support a claim of entitlement.

The crux of the SBCSC's argument was that seniority

rights in any context are not vested property rights but "strictly a creature of a collective bargaining agreement." However, neither the undisputed facts of this case, nor the laws applicable to teacher employment and tenure, support the SBCSC's contention.

At the outset, the record in the present cause clearly shows that collective bargaining agreements in effect in the SBCSC prior to the 1980-83 CBA did not establish seniority lists. Prior collective bargaining agreements also did not have provisions governing layoff and recall. The seniority list published in 1980 under the 1980-83 CBA was the first for the SBCSC. Under prior collective bargaining agreements, "there was no such thing as seniority." Nevertheless, the SBCSC stipulated that a seniority system was in effect prior to the 1980-83 CBA which determined seniority by total years of service, irrespective of any break or interruption in service. Furthermore, under prior layoffs, years of service in the corporation were a factor in determining which teachers would be given notices. It is clear that, prior to the 1980-83 CBA, there was a seniority system in place in the SBCSC which was not a creature of any collective bargaining agreement, and which gave teachers seniority rights for purposes of protection from layoffs based upon total years of service, regardless of any break or interruption. The issue before this Court is whether the Indiana Court of Appeals erred in determining that these rights were not protectable interests.

Property interests may take many forms. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576 (1972). However, in the context of property rights which are protected from arbitrary deprivation by an arm of the State, the law is settled that such rights may exist pursuant to "statutory and administrative standards defining eligibility" for such benefits, Id.; interests in a contract of public employment held under tenure provisions, Id.; or "rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits." Id., 408 U.S. at 577. The absence of an explicit contract provision does not foreclose the possibility that a teacher has a property interest in employment. Perry v. Sindermann, 408 U.S. 597, 601 (1972). Explicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in light of the surrounding circumstances. Id., 408 U.S. at 602.

In the present case, the seniority rights held by Toth and Ujdak prior to the 1980-83 CBA were vested property rights which were secured to them by contract, statute, and mutually explicit understandings. In Roth, supra, this Court held that a teacher, even without a tenured position, held a property right in continued employment which was secured by the terms of his employment, and that he could not be arbitrarily deprived of such rights. In the Roth case, this Court found that these rights terminated at the end of the teacher's contract because by its terms it did not provide for employment beyond this termination date. Roth, 408 U.S. at 578. In the present case, however, Toth's and Ujdak's rights in their seniority which accumulated prior to the 1980-81 school year were secured by their teaching contracts and seniority system in effect in those prior years. Accumulated seniority rights by their very nature survive the period of employment for which they accrue, and both employees and employers expect their benefits to be effective in future years. Toth's and Ujdak's prior contracts made no provision for the termination of these rights, and there was no rule or understanding at the time these rights accrued that they could be retroactively terminated by subsequent agreements because of their breaks in service. Toth and Ujdak had much more than a "unilateral expectation" that they would retain these earned rights, and they had a justifiable reliance that these rights would not be undermined. Toth and Ujdak therefore

had a property interest in these rights which is protected by the Due Process Clause of the Fourteenth Amendment and cannot be arbitrarily divested.

As note in Perry v. Sindermann, supra, even if the contract does not specifically provide for the continuation of an employment benefit beyond the term of the contract, the employee has a protected property interest in the benefit if its continuation can be implied. Perry, 408 U.S. at 601-602. In the present case, the record shows that, prior to the 1980-83 CBA, both teachers and the administration understood that seniority rights, as applicable to protection from layoffs, would be based upon total years of experience in the school corporation, regardless of any break or interruption in service. This was the system "in practice" at the time, and justifies a legitimate claim of entitlement. Id. Therefore, Toth's and Ujdak's claims to their accumulated seniority were not based upon a "unilateral expectation of entitlement," but upon mutually explicit understandings.

B. Toth's and Ujdak's vested seniority rights were acquired pursuant to contract and may not be impaired by the SBCSC as an arm of the State of Indiana.

Contractual obligations due to a teacher under an employment contract are clearly entitled to legal protection. In State of Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938), a teacher in a township school had acquired tenure rights under the Indiana Teacher Tenure Act under her teaching contracts from 1924 through 1934. This Court held that the State of Indiana may not divest her of these tenure rights, even though in 1933 the Tenure Act was amended so that it no longer applied to township teachers. Such a deprivation was held to be an unconstitutional impairment of

the contractual obligations which were due to the teacher under her prior contracts, under Art. 1, § 10 of the United States Constitution. Brand, 303 U.S. at 105; See also Haas v. Holder, 218 Ind. 263, 268, 32 N.E.2d 590, 592 (1941) (same). In the present case, the rights of Toth and Ujdak to their accumulated seniority arose from their contractual relationships with the SBCSC prior to the 1980-83 agreement. As such, they are property rights arising under state law and protected by both the Contracts Clause of Art. 1, § 10 and the Due Process Clause of the Fourteenth Amendment.

The law is further settled that a teacher may have a protected property interest in benefits which are incidental to the contract of employment. In Weest v. Board of School Commissioners of City of Indianapolis, 162 Ind. App. 614, 320 N.E.2d 748 (1974), the school board and teacher's union entered into a collective bargaining agreement which deducted one day of sick leave from each teacher's statutory allotment in order to create a "sick leave bank." The court noted that "the Board lacks authority to enter into any agreement which operates in derogation of the laws governing compensation of teachers." Id., 162 Ind. App. at 618, 320 N.E.2d. at 752. The court upheld the plan only because the agreement had a provision that reimbursed the teacher for the deducted sick day if the teacher had exhausted her accumulated sick leave, and thus there was no deprivation of the teacher's rights. Id. In the present case, however, there was no compensation to Toth or Ujdak for the seniority rights of which they were deprived. the SBCSC has failed to show why these accumulated seniority rights are any less entitled to protection than a teacher's accumulated sick leave as in Weest. These seniority rights arose from contract and are protected property rights in which Toth and Ujdak have a justifiable expectation.

Presumably the seniority provision in Art. XXIII,

section 2, of the 1980-83 CBA was intended as an additional means to protect more recently hired minority positions from layoff, as a means to facilitate the SBCSC's affirmative action plan. See Britton, supra, 819 F.2d at 770 ("The layoff plan ensured that if layoffs were necessary they would not impede achievement of the board's goal of racial parity between teachers and students.").[3] Toth and Ujdak recognize that reducing the disparity in minority representation in Indiana's teaching force may be a legitimate public interest. See Id. at 767. Conceivably this could translate into a public purpose in enhancing the seniority of more recently hired minority employees. However, the Britton court found that this was an improper purpose, absent a showing that the plan was a remedy for past discrimination. Id. at 777-78. As the record makes no such showing, the SBCSC has shown no legitimate public purpose in retroactively depriving Toth and Ujdak of contractual seniority rights. There can be no benefit which inures to the public by laying off a more senior and experienced teacher in favor of a less experienced one when both are equally qualified. Thus the SBCSC's action in retroactively depriving Toth and Ujdak of their contractual seniority rights did not advance the public interest and was not reasonably adapted to the achievement of any legitimate public purpose.

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[3] SBCSC was clearly willing to go to great lengths to protect minority bargaining unit employees, as Art. XXIII, section 10 of the 1980-83 CBA provides: "The Board hereby agrees to indemnify the NEA-South Bend and hold it harmless against any and all claims, demands, suits or other forms of liability that should arise out of, or by reason of Section 9 [the "no minority layoff" clause] of this article."

C. The SBCSC was without authority under state law to enter into an agreement depriving Toth and Ujdak of vested rights.

The SBCSC may be correct in contending that neither the Fourteenth Amendment nor the Teacher Tenure Act "created" Toth's and Ujdak's vested seniority rights. Nevertheless, these rights, once created pursuant to contract and mutually explicit understandings, were entitled to statutory as well as constitutional protection. While the SBCSC is authorized by statute to collectively bargain with the designated representative of its employees, the same statute provides that "[n]o contract may include provisions in conflict with (a) any right or benefit established under state or federal law[.]" I.C. § 20-7.5-1-3 (Burns 1997) (emphasis added). The SBCSC was therefore without authority under state law to enter into a collective bargaining agreement which purported to divest Toth and Ujdak of rights which had already accrued and were vested under prior contracts. The 1980-83 CBA could no more bargain away their constitutionally protected, vested contract rights under its seniority clause than it could bargain away their constitutional rights to equal protection under the illegal "no-minority-layoff" clause.

The parties to the 1980-83 CBA recognized the possibility of the illegality of some of its provisions, and provided a savings clause, to wit:

> Should any Article, Section or clause of this Agreement be declared illegal by a court of competent jurisdiction, said Article, Section or clause, as the case may be, shall be automatically deleted from this Agreement to the extent that it violates the law, but the remaining Articles, Sections, and clauses shall remain in full force and effect for the duration of this

Agreement, if not affected by the deleted Article, Section or clause.

(1980-83 CBA, Art. XXV(B)).

As the SBCSC was without authority to enter into a collective bargaining agreement which deprived Toth and Ujdak of constitutionally protected property and contract rights, the provision of Art. XXIII, section 2 of the 1980-83 CBA purporting to define seniority as "years of continuous service" was illegal as applied and is to be deleted from the agreement.[4]

D. Cases relied upon by the Court of Appeals of Indiana were in the context of private sector labor litigation which did not involve state action or constitutionally protected interests, and are inapplicable to the present question.

The Court of Appeals was in error when it found that this case is governed by Wagner Mfg., Inc. v. Culbertson, 137 Ind. App. 160, 206 N.E.2d 378 (1965); Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228 (1st Cir. 1996); Dempsey v. Atchison, Topeka & Santa Fe Ry. Co., 16 F.3d 832 (7th Cir. 1994); and United Food & Comm. Workers Union Local 7 v. Goldstar Sausage Co., 897 F.2d 1022 (10th Cir. 1990). Without exception, these cases dealt with

[4] It should be noted that the 1980-83 CBA could have been made legal by "grandfathering in" already vested rights, or otherwise providing some compensation for their deprivation. However, the agreement neither contains nor implies any such provision.

collective bargaining agreements in the private sector, in an industrial context in which tenure is not recognized and protected by statute. None of the employers in these cases were acting pursuant to nor under color of state law, and these cases did not deal with constitutional protection of property interests or contract rights. What distinguishes the circumstances in the present case from the cases cited above is that the United States Constitution places limits on the power of the SBCSC as an arm of the State of Indiana to deprive Toth and Ujdak of vested property rights and impair their contract rights.

The Indiana Legislature expressly recognized this distinction when it enacted the Certificated Educational Employee Bargaining Statute, I.C. § 20-7.5-1-1 et seq., which authorizes Indiana school corporations to bargain with teacher unions. The Indiana Legislature noted that:

> The relationship between school corporation employers and certificated school employees is not comparable to the relation between private employers and employees among others for the following reasons: (i) A public school corporation is not operated for profit but to insure [sic] the citizens of the state rights guaranteed to them by the Indiana State Constitution; . . . and (iv) public school corporations have different obligations with respect to certificated school employees under constitutional and statutory requirements than private employers have to their employees.

I.C. § 20-7.5-1-1(d) (Burns 1997).

Thus, there is nothing in either statute or caselaw which supports the actions of the SBCSC in this case. There is not a reported case directly facing the issue of whether the

seniority rights acquired by public school teachers, not as part of any collective bargaining agreement, may be divested by the School Corporation as an arm of the State without due process of law. However, it is clear that the private sector cases relied upon by the Court of Appeals are simply inapplicable to the relationship between a school corporation and its certificated employees. The use of seniority as a bargaining chip in collective bargaining negotiations, at least as it was used by the SBCSC in the present case, undermines both the Indiana Teacher Tenure Act and the public policy of Indiana, which is to "secure permanency in the teaching force," Watson v. Burnett, 216 Ind. 216, 222, 23 N.E.2d 420, 423 (1939), and create "an apolitical, merit-based work force in vital areas of government service." Stewart v. Fort Wayne Community Schools, 564 N.E.2d 274, 280 (Ind. 1991).

E. Certiorari is necessary to ensure that constitutional due process protections and freedom from impairment of contractual obligations are preserved.

As there are no reported cases directly addressing the issue raised in the present Petition, this case represents the opportunity to address this important question of law and ensure that the protections of the Due Process Clause of the Fourteenth Amendment and Art. 1, Sec. 10 of the Constitution are extended by the courts to the vested seniority rights acquired by Toth and Ujdak and others similarly situated. These vested rights, acquired pursuant to contract and mutually explicit understandings, are precisely the type of interests which this Court has found to be protectable in Roth, Perry, and Brand, supra. The opinion of the Indiana Court of Appeals finding that Toth and Ujdak had no protectable interests is directly contrary to the prior opinions

of this Court in the foregoing cases. As this Court is the ultimate interpreter and guardian of the Constitution, certiorari is necessary and appropriate to preserve these important constitutional safeguards.

## CONCLUSION

For the foregoing reasons, the judgment of the St. Joseph Circuit Court was correct, and the opinion of the Indiana Court of Appeals reversing the Circuit Court's judgment was in error and contrary to the United States Constitution. Petitioners Toth and Ujdak therefore respectfully pray that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Indiana, and grant Petitioners all further relief which the Court shall find to be just and proper.

Respectfully submitted:

DONALD E. WERTHEIMER
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Dated: January 22, 2001

APPENDIX A

ST. JOSEPH CIRCUIT COURT

1999 CALENDAR TERM

CAUSE NO. P-1077

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JULIE ANDREWS et al.,
*Plaintiffs*,

v.

SOUTH BEND COMMUNITY
SCHOOL CORPORATION et al.,
*Defendants*.

**ORDER ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

**COMES NOW** the court on the defendant's Motion to Dismiss and the plaintiff's Motion for Summary Judgment. The Court finds that the plaintiffs had a vested property interest in their seniority rights held prior to the 1980-1983 collective bargaining agreement, making them tenured teachers at the time they were laid off. Therefore the plaintiffs should have been classified as group one teachers. The plaintiff's damages shall be compensated pursuant to the formula that has already been negotiated and determined by counsel for group one teachers.

**THEREFORE,** it is **ORDERED, ADJUDGED,** and **DECREED** that the plaintiff's Motion for Summary Judgment is **GRANTED.**

Clerk is directed to forward a copy of this order to parties of record.

So ORDERED this 9th day of August, 1999.

/s/ Robert O. Bowen
ROBERT O. BOWEN, SPECIAL JUDGE
ST. JOSEPH CIRCUIT COURT

APPENDIX B

**IN THE**
**COURT OF APPEALS OF INDIANA**

71A04-9909-CV-427

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SOUTH BEND COMMUNITY SCHOOL CORPORATION,
*Appellant-Defendant*,

vs.

PATRICIA TOTH and BONITA UJDAK,
*Appellees-Plaintiffs*.

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APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Robert O. Bowen, Special Judge
Cause No. P-1077

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**(Handdown Date)**

**MEMORANDUM DECISION-NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-defendant South Bend Community School Corporation (the SBCSC) appeals the entry of summary judgment in favor of appellees-plaintiffs Patricia Toth and Bonita Ujdak (collectively, the teachers). Specifically, the

SBCSC maintains that the trial court erred in determining that the teachers held a vested property interest in a method of calculating a member's seniority status under one collective bargaining agreement, such that SBCSC could not alter that method of calculation in subsequent agreements.

## FACTS

Toth and Ujdak were employed by the SBCSC as full-time teachers. Prior to 1980, the SBCSC and the teacher's union were parties to a series of collective bargaining agreements that calculated seniority based upon the total years of SBCSC teaching experience of each teacher, regardless of whether there was any break in service.

In 1980, the union and the SBCSC negotiated a new collective bargaining agreement which included a revised system for calculating seniority. Specifically, the collective bargaining agreement defined seniority as "the teacher's length of continuous service from his/her beginning date of last employment in the [SBCSC]." (Emphasis supplied). Record at 658.

In 1982, the SBCSC announced that it was required to lay off 146 teachers because of declining enrollment and budgetary constraints. Those layoffs were conducted according to the seniority system established by the teacher's union in the 1980-83 collective bargaining agreement. In the certification area of "elementary education," teachers with four years or less of continuous teaching experience were subject to the layoff. R. at 198.

Toth had two years of continuous teaching experience since her last employment by the SBCSC at the time of the 1982 layoff, inasmuch as she had been employed by the SBCSC as a full-time teacher during the school years of 1969-70, 1970-71, 1971-72, 1979-80, and 1980-81. R. at 583, 586. Ujdak had accumulated three years of continuous

teaching experience at the time of the 1982 layoff. She had been employed by the SBCSC as a full-time teacher during the school years of 1964-65, 1965-66, 1978-79, 1979-80, and 1980-81. R. at 555-56. Toth and Ujdak, along with 144 other teachers of the SBCSC were laid off.

On October 5, 1982, Toth, Ujdak, and a number of other teachers filed a motion for a preliminary injunction in the trial court, seeking to enjoin the SBCSC from implementing the layoff under the terms of the collective bargaining agreement. Specifically, the teachers asserted that a "no minority layoff" clause in the 1980-83 agreement constituted reverse discrimination in violation of the equal protection clause of the fourteenth amendment to the United States Constitution.

The action was ultimately removed to the U.S. District Court in South Bend, where it was consolidated with another action filed by the teachers. See Britton v. South Bend Community Sch. Corp., 819 F.2d 766 (7th Cir. 1987). The Britton court ultimately ruled in favor of the teachers with regard to the equal protection argument. Id. at 772.[1]

Following a remand to the U.S. District Court, the parties resolved the claims of those teachers who would not have been laid off but for their race. Those teachers were known as "Group 1 plaintiffs." Additionally, it was determined that numerous plaintiffs who were not in Group 1, including Toth and Ujdak, did not have any viable claims over which the federal court had jurisdiction. As a result, the action was remanded to the trial court on December 21, 1989, for further proceedings regarding any remaining state

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[1] All 146 teachers laid off by the SBCSC were white. Forty-eight had more seniority than African Americans who were not laid off. Two years later, twenty of the forty-eight had not yet been recalled. Id. at 767.

law claims.

On February 20, 1992, the SBCSC filed a motion to dismiss, contending that the remaining plaintiffs lacked standing to assert any additional claims in the action. Specifically, the SBCSC maintained that because of their relatively low seniority, "each of the [remaining] plaintiffs would have been laid off irrespective of the no-minority layoff provision" contained in the 1980-83 collective bargaining agreement. R. at 198-99. Those plaintiffs who would have been laid off due to seniority, regardless of race, were referred to as "Group 2 plaintiffs."

The teachers claim that they had certain vested seniority rights, which predated the 1980-83 collective bargaining agreement. The teachers also maintained that the agreement did not divest them of those years of seniority that had already vested prior to the effective date of the 1980-83 collective bargaining agreement. Thus, the teachers argued that they should be classified as Group 1 teachers in light of their higher seniority that was summarily and unilaterally taken away from them when the 1980-83 collective bargaining agreement was applied to their particular seniority status.

On July 29, 1992, the trial court refused to dismiss the teachers' claims that they should have been placed in Group 1. Thereafter, on November 12, 1996, the teachers moved for summary judgment with respect to their "vested" seniority rights. R. at 331, 356. Additionally, Toth argued that she had been promised a particular seniority status by the SBCSC's Human Resources Director, and Ujdak urged that a teacher with less seniority, even as calculated under the 1980-83 agreement, had been retained in violation of the Indiana Teacher Tenure Act.[2]

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[2] IND. CODE § 20-6.1, et seq.

The SBCSC opposed the motions and filed cross-motions for summary judgment against the teachers. The SBCSC argued that judgment should be entered in their favor because parties to a collective bargaining agreement are free to establish, and to modify the methods of selecting persons for layoff, including the method of calculating seniority, and that seniority is not a "property right" that can "vest" in an employee. R. at 683, 693.

On August 9, 1999, the trial court granted the teachers' motion for summary judgment, finding that they had a vested property interest in their seniority rights held prior to the 1980-83 collective bargaining agreement. As a result, the trial court determined that they were tenured teachers at the time they were laid off and should have been classified as group one teachers. R. at 804. The SBCSC now appeals.

## DISCUSSION AND DECISION

### 1. Standard of Review

In reviewing the trial court's grant of summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. Smith v. Allstate Ins. Co., 681 N.E.2d 220, 223 (Ind. Ct. App. 1997). We do not weigh evidence, but will liberally construe the facts in the light most favorable to the nonmoving party. General Motors Corp. v. Northrop Corp., 685 N.E.2d 127, 132 (Ind. Ct. App. 1997), trans. denied. Summary judgment should be granted only when the designated evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). On appeal, we must determine whether there is a genuine issue of material fact and whether the law

has been correctly applied by the trial court. City of Elkhart v. Agenda: Open Government, Inc., 683 N.E.2d 622, 625 (Ind. Ct. App. 1997), trans. denied. The party appealing the grant of summary judgment has the burden of persuading this court on appeal that the trial court's ruling was improper. Jordan v. Deery, 609 N.E.2d 1104, 1107 (Ind. 1993).

## II. SBCSC's Claims

The SBCSC asserts that the trial court's grant of summary judgment was erroneous for the reason that the teachers did not have a "vested property interest" with respect to their employment in the school system. Appellant's brief at 9. As a result, the SBCSC contends that it was entitled to summary judgment as a matter of law.

To resolve this issue, we first turn to the relevant provisions of the Teacher's Tenure Act, I.C. § 20-6.1-4-14.5:

> (a) The provisions of this chapter may not be construed to limit the provisions of a collective bargaining agreement negotiated under IC 20-7.5.[3]
>
> (b) Notwithstanding this chapter, this chapter does not prohibit a school employer and an exclusive representative from collectively bargaining contracts that alter the requirements of sections 10, 10.5, 11, 12, and 14 of this chapter and IC 20-6.1-5-15.[4]

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[3] This article concerns Certificated Educational Employee Bargaining.

[4] These sections deal with the justifiable decrease in the number of teaching positions.

In construing the above, it is apparent that the relevant sections of the Teacher's Tenure Act explicitly permit changes to seniority provisions and would allow the SBCSC to negotiate changes to the seniority clause of the collective bargaining agreement. Thus, there is no merit to the teacher's contentions that they have the legally protected interests they seek, because none exist under the act. Moreover, we note that our courts, as well as those from other jurisdictions have held that seniority obligations imposed by a collective bargaining agreement expire upon the termination of that agreement.

For instance, in Wagner Mfg., Inc. v. Culbertson, 137 Ind. App. 160, 206 N.E.2d 378 (1965), this court observed that:

> It is well settled that seniority rights are not vested rights but are created by either by statute or contract. . . . [Citations omitted]. It also seems to be 'well settled that such (seniority) rights of the individual employees can be bargained away by the union representing them in collective bargaining. . . ."[Citations omitted].

Id. at 167, 206 N.E.2d at 382-83; see also Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 232 (1st Cir. 1996) (seniority rights are subject to revision or even subrogation with the termination or renegotiation of the collective bargaining agreement); Dempsey v. Atchison, Topeka, and Santa Fe Ry. Co., 16 F.3d 832, 839 (7th Cir. 1994) (any entitlement established by the collective bargaining agreement, including seniority rights, are generally subject to modification or expiration); United Food Workers Union Local 7 v. Gold Star Sausage Co., 897 F.2d 1022, 1026 (10th Cir. 1990) (seniority is not only born from the collective bargaining agreement, it does not exist apart

from that contract).

Notwithstanding the above, the teachers attempt to distinguish the circumstances presented here from the cases cited above and argue that their status as public employees somehow transformed the seniority provisions of prior collective bargaining agreements into property rights which cannot be arbitrarily divested without due process. In Perry v. Sinderman [sic], 408 U.S. 597, 601 (1972), our supreme court declared that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support a claim of entitlement to the benefit."

Here, no such rule exists, inasmuch as our statutes provide that a school corporation and a teacher's union are entitled to alter requirements regarding seniority. See I.C. § 20-6.1-4-14.5(b). Similarly, there was no evidence of any mutual agreement that the SBCSC and the teacher's union could not agree to change seniority rights. To the contrary, the only basis for the teachers' claim was a unilateral expectation on their part that the method of calculating seniority would not be changed. In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the United States Supreme Court held that:

> [t]o have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Here, the teachers have not shown any "legitimate claim of entitlement" to the seniority provisions of expired collective bargaining agreements, and thus do not have a protectable property interest in those agreements. The change in the seniority provisions caused by the 1980-83

collective bargaining agreement was agreed to by the teachers' bargaining representative. As a result, the change was not merely unilaterally imposed upon the teachers by the SBCSC. Toth and Ujdak may not complain of a constitutional violation merely because they do not like the terms of the contract which their union negotiated. Although the teachers may disagree with the decision that was made by their union representative, they may not successfully claim that the decision amounted to a constitutional violation.

In sum, the SBCSC did not impair any pre-1980 contractual rights of the teachers when it conducted the layoff in 1982, for the reason that those contractual rights simply expired. The SBCSC's method of calculating seniority which was contained in pre-1980 collective bargaining agreements expired upon the termination of those agreements. Thereafter, a new method was agreed upon by the SBCSC and the teachers' union in the 1980-83 collective bargaining agreement. Here, the SBCSC's application of that new method was proper under the Teacher Tenure Act and did not violate the teachers' contractual or constitutional rights because the contracts which had created those rights had expired. As a result, the teachers have not advanced a successful argument suggesting that the seniority calculations of pre-1980 collective bargaining agreements could not be changed in post-1980 collective bargaining agreements. Inasmuch as the trial court has determined to the contrary, we are compelled to reverse that decision.

This cause is reversed and remanded to the trial court with instructions that summary judgment be entered in favor of the SBCSC on this issue. We additionally instruct the trial court to conduct further proceedings not inconsistent with this opinion with respect to the remaining claims in this cause.

APPENDIX C

**IN THE**
**INDIANA SUPREME COURT**

Cause Number 71A04-9909-CV-427

Lower Court Number: P1077

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SOUTH BEND COMMUNITY SCHOOL CORPORATION -V- TOTH, PATRICIA

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You are hereby notified that the Supreme Court has on this day 10/25/00

This matter comes before the Indiana Supreme Court on a Petition to Transfer from a decision of the Court of Appeals, pursuant to Indiana Appellate Rule 11(B). The Court has reviewed the decision of the Court of Appeals, the record of proceedings, the briefs which were filed in the Court of Appeals, and the materials which were submitted in connection with the request to transfer jurisdiction. Each member of the Court has voted on the case. Each member of the Court has had the opportunity to voice that justices views the appeal in conference with the other justices.

Being duly advised, the Court now denies the appellee's Petition to Transfer.

Randall T. Shepard, Chief Justice

All Justices concur

WITNESS my name and the seal of said Court
this 25TH day of October, 2000

/s/ Brian Bishop
Clerk Supreme Court, Court of Appeals
and Tax Court

APPENDIX D

ST. JOSEPH CIRCUIT COURT

CAUSE NO. P-1077

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JULIE ANDREWS (PATRICIA TOTH AND BONITA UJDAK ET AL),
*Plaintiffs*,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, ET AL
*Defendants*.

**ORDER**

Plaintiffs Patricia Toth (Toth) and Bonita Ujdak (Ujdak) each filed a motion for summary judgment in part contending that the South Bend Community School Corporation (SBCSC) deprived them of a vested property interest in seniority rights in connection with their layoff from the SBCSC in 1982. The SBCSC filed a cross-motion for summary judgment on that issue. On August 9, 1999, this Court issued an order holding that "the plaintiffs had a vested property interest in their seniority rights held prior to the 1980-83 collective bargaining agreement," and therefore granting the motions for summary judgment submitted by Toth and Ujdak.

On June 5, the Indiana Court of Appeals issued a Memorandum Decision holding that:

[T]he SBCSC did not impair any pre-1980 contractual

> rights of the teachers when it conducted the layoff in 1982, for the reason that those contractual rights simply expired. The SBCSC's method of calculating seniority which was contained in pre-1980 collective bargaining agreements expired upon the termination of those agreements. Thereafter, a new method was agreed upon by the SBCSC and the teachers' union in the 1980-83 collective bargaining agreement. Here, the SBCSC's application of that new method was proper under the Teacher Tenure Act and did not violate the teachers' contractual or constitutional rights because the contracts which had created those rights had expired. . . . Inasmuch as the trial court has determined to the contrary, we are compelled to reverse that decision.
>
> This cause is reversed and remanded to the trial court with instructions that summary judgment be entered in favor of the SBCSC on this issue. We additionally instruct the trial court to conduct further proceedings not inconsistent with this opinion with respect to the remaining claims in this cause.

Mem. Dec. at 9-10.

The "remaining claims in this cause" are as follows:

Toth has filed a motion for summary judgment, and the SBCSC has filed a cross-motion for summary judgment, on a claim for promissory estoppel. These claims have been fully briefed and are now ripe for decision by this Court. Toth contends that William Roberts of the SBCSC promised "that if she returned to teaching (at the SBCSC) during the 1979-80 school year, she would retain the seniority which she earned in the 1969 through 1972 school years." The

SBCSC noted that Roberts has denied making such a promise. The SBCSC further contends that the teachers' union had the authority to change the seniority system during bargaining, such that any reliance by Toth on the alleged promise was unreasonable. After full consideration of the memoranda and evidence submitted by both parties, this Court agrees with the SBCSC. Assuming *arguendo* that the alleged promise was made, any reliance upon the promise by Toth was unreasonable as a matter of law. Summary judgment in favor of SBCSC is therefore appropriate on Toth's claim of promissory estoppel.

Ujdak has filed a motion for summary judgment, and the SBCSC has filed a cross-motion, in which Ujdak claims that the SBCSC laid her off in 1982, while it did not lay off a similarly qualified teacher with less seniority (Michael Downs). This issue has likewise been fully briefed and is ripe for decision by this Court. Ujdak contends that the SBCSC's actions constitute a violation of the 1980-83 collective bargaining agreement (CBA), and that she is therefore entitled to relief. The SBCSC notes that the CBA provides that all claims that the agreement has been violated are subject to the grievance process, and ultimately to arbitration. It is undisputed that Ujdak never filed any grievance regarding her layoff and the retention of teacher Michael Downs. Ujdak has not presented this Court with sufficient evidence to suggest that pursuing the grievance process would have been futile under the circumstances. The Court therefore finds that Ujdak's failure to first exhaust her remedies under the CBA bars her from seeking relief in this Court. Summary judgment in favor of SBCSC is therefore appropriate.

For the reasons set forth above, the motion for summary judgment filed by plaintiff Patricia Toth is DENIED IN FULL. The motion for summary judgment filed by plaintiff Bonita Ujdak is DENIED IN FULL. The

system. The seniority postings are consistent with this contention. By adding the three additional years of seniority, Toth would have withstood the massive layoffs in the Spring of 1982. Further, these additional three years, in any event, should be awarded to her which would enhance her seniority standing in general.

Concerning Bonita Ujdak, she is claiming an additional two years of seniority. Likewise, her seniority (as with Toth) is predicated upon the prior existing seniority system in this school system which predated the 1980-83 Collective Bargaining Agreement. By awarding her the two additional years to which she is entitled, Ujdak, likewise, would have withstood the massive layoffs in Spring of 1982. Further, the additional two years would likewise enhance her overall seniority status in this school system.

Record at 237-38.